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IN THE

# Supreme Court of the United States

**October Term, 1976**

**No. 75-442**

JOHN H. POELKER, Mayor of the City of St. Louis, Missouri, and R. DEAN WOCHNER, M.D., Director of Health and Hospitals and Acting Commissioner of Hospitals of the City of St. Louis, Missouri,

*Petitioners,*

*v.*

JANE DOE, and A CLASS,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

## BRIEF OF AMERICAN JEWISH CONGRESS, BOARD OF CHURCH AND SOCIETY OF THE UNITED METHODIST CHURCH, NATIONAL WOMEN'S CONFERENCE OF THE AMERICAN ETHICAL UNION, NEW YORK STATE COUNCIL OF CHURCHES, UNION OF AMERICAN HEBREW CONGREGATIONS and UNITARIAN UNIVERSALIST WOMEN'S FEDERATION, *Amici Curiae*

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This brief *amici curiae* is submitted with the consent of the parties.

## Statement of the Case

This class action was initiated by Jane Doe in the U.S. District Court, Eastern District, Eastern Division of Missouri, against John H. Poelker, Mayor of St. Louis, and Dr. R. Dean Wochner, the City Director of Health and Hospitals. Plaintiff alleged that she was an indigent citizen of St. Louis, that she was pregnant, and that she had sought and been refused a non-therapeutic abortion in the city's hospitals. (She later secured an abortion at a private clinic.) She sought declaratory and injunctive relief against the policies, rules and staffing procedures in the city hospitals.

In March 1974, the District Court dismissed the complaint for lack of standing. That order was reversed and the case remanded by the Eighth Circuit Court of Appeals. The District Court then found for the city and the plaintiff appealed, claiming an infringement on her right of privacy and a violation of the Equal Protection Clause of the Fourteenth Amendment of the Constitution. She claimed that the policy of the city to refuse such abortions and the staffing procedure that resulted in the hospital being staffed only by physicians associated with a Catholic Jesuit university, who were prohibited for moral and religious reasons from performing the abortions, resulted in the denial of equal protection to indigent women.

The Court of Appeals declared on April 14, 1975, that the city's policy of prohibiting all non-therapeutic abortions was an unconstitutional infringement on a woman's right of privacy and a denial of equal protection to indigent



women. The court further found that the method of staffing the hospital clinics with physicians who for religious and moral reasons would not perform abortions, resulted in constitutional violations. It remanded the case to the District Court for declaratory relief, including a change in the staffing procedures in order to insure the availability of abortions for indigent women. However, the court indicated that no one may be forced to perform an abortion if it violated his or her religious or personal beliefs.

The defendants' petition for writ of certiorari was granted by this Court.

## Interest of the *Amici*

The organizations joining in this brief neither favor nor oppose abortion. They believe that a woman's decision on whether to undergo abortion must be her own, uncoerced by government. They believe further that the principle of religious freedom forbids government to impose upon all the theology of one or more sects. For these reasons, they joined in submitting to this Court a brief *amici curiae* in *Roe* v. *Wade,* 410 U.S. 113 (1973) and *Doe* v. *Bolton,* 410 U.S. 179 (1973). They believe that reversal of the judgment in the case before this Court would impair these principles and would substantially impair what the Court sought to accomplish in those cases. Finally, they believe that reversal of the judgment would effect inequitable discrimination against the poor, depriving them solely because of their poverty of a right this Court has held to be possessed by all women. Accordingly, they respectfully submit this brief *amici curiae.*

## The Question to Which This Brief Is Addressed

This brief is addressed to the single question whether, consistent with the Supremacy Clause (Article VI) of the United States Constitution and the First and Fourteenth Amendments, a municipal hospital may deny, solely for reasons it deems religious and moral, abortion services to economically deprived women who are unable to pay for them in other hospitals.

## Summary of Argument

1. The action by the mayor of St. Louis in forbidding abortions in municipal hospitals violates the Supremacy Clause, which declares that the Constitution is the supreme law of the land. The Constitution provides for an amendment procedure which allows the people to overrule Supreme Court decisions. Inability to achieve this end by reason of the fact that a specific Court decision may be consistent with rather than opposed to the popular will often leads to efforts to nullify the decision through varieties of schemes and devices such as the mayor's dictate in the present case. Success in that effort here would result in an effective nullification of a freedom secured by the Bill of Rights and would make a mockery of the Supremacy Clause.

2. The mayor's action violates the First Amendment's dual guaranty of church-state separation and the free exercise of religion by imposing upon the entire community the religious doctrine of those to whom abortions are sinful. This unconstitutional imposition cannot be justified on the



claim that abortion is immoral any more than a law banning the use of contraceptives can be so justified. In either case, the claim of immorality is no more than an effort to impose upon the entire community the religious doctrines of a particular group. This is particularly true where, as in both cases, the majority of Americans do not consider the practice to be immoral.

3. The mayor's action constitutes discrimination against the poor. It deprives them of a procedure which is not unlawful and is readily and legally available to those who are financially able to obtain it at private hospitals. Freedoms secured by the Bill of Rights are not the exclusive possession of those who are fortunately financially able to pay for them.

## ARGUMENT

### I

### The action by the mayor of St. Louis in forbidding abortions in municipal hospitals violates the Supremacy Clause (Article VI) of the Constitution.

*Roe* v. *Wade*, 410 U.S. 113 (1973), and *Doe* v. *Bolton*, 410 U.S. 179 (1973), are hardly the first decisions declaring unconstitutional a particular state or federal statute which have aroused strongly articulated opposition. Indeed, the history of this Court indicates that there has hardly been a significant constitutional law decision which has not aroused from some group or other protests as intense as those which have been met by *Wade* and *Bolton*. The Court's first significant decision in constitutional law,

*Chisholm* v. *Georgia,* 2 Dall. (2 U.S.) 419 (1793), aroused a storm of controversy which, *mutatis mutandis,* equaled if it did not exceed in extent and intensity that experienced by *Wade* and *Bolton.* 1 C. Warren, The Supreme Court in United States History, 96 *et seq.* (Warren notes, at p. 100, that the Georgia House of Representatives passed a bill providing that any Federal marshal or other person who executed any process issued by the Supreme Court in the *Chisholm* case should be declared "guilty of felony and shall suffer death, without benefit of clergy, by being hanged.")

Similar opposition, varying in degrees of intensity, was experienced by such decisions as *Dred Scott* v. *Sanford,* 19 How. (60 U.S.) 393 (1857), and *Pollock* v. *Farmers Loan and Trust Co.,* 157 U.S. 429 (1895). 3 Warren 24-41, 422. But in each of these cases the opposition resulted in constitutional amendments, the 11th, 13th and 16th respectively, nullifying the Court's decisions. This is the procedure sanctioned by Article V of the Constitution for lawfully and effectively nullifying Court decisions which contravene the will of the people. What the Constitution does not sanction is nullification through defiance and evasion.

Overt defiance is fortunately rare. When it does occur, as in the events dealt with in *Cooper* v. *Aaron,* 358 U.S. 1 (1958), the reaction of the government and people of the United States quickly and adequately frustrates it. More frequent and considerably more difficult to handle are efforts by legislatures and governmental officials who, while paying lip service to the Court's mandate, seek to frustrate or limit it by evasive devices such as the one involved in the



present case. The history of the 13th, 14th and 15th Amendments is replete with illustrations.

In *Bailey* v. *Alabama,* 219 U.S. 219 (1911), the Court declared unconstitutional under the 13th Amendment, a state statute imposing criminal penalties against defaulting sharecroppers or other plantation workers. To the same effect, see *Taylor* v. *Georgia,* 315 U.S. 25 (1942), and *Pollock* v. *Williams,* 322 U.S. 4 (1944). In *Guinn* v. *United States,* 238 U.S. 347 (1915), the device of grandfather clauses was held to be an impermissible effort to evade the 14th and 15th Amendments. The same result was reached in respect to poll taxes in *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663 (1966). White primaries, racial restrictive covenants and separate but equal educational facilities, invalidated respectively in *Smith* v. *Allwright,* 321 U.S. 649 (1944); *Shelley* v. *Kramer,* 334 U.S. 1 (1948), and *Brown* v. *Board of Education,* 347 U.S. 483 (1954), are further examples of the same efforts at frustration and evasion which this Court has struck down.

What these and many other cases that might be cited indicate in respect to the rights of racial minorities is that inability to overrule decisions of the Court through constitutional amendment by reason of the fact that they may be consistent with rather than opposed to the popular will of the American people as a whole often leads to efforts to nullify them through schemes and devices formulated by imaginative executives and legislators and their legal advisers. In the same pattern and perhaps closer to home are the devices experimented with in efforts to nullify or evade the Court's decisions forbidding prayer recitation and devotional Bible reading in the public schools. *Engel*

v. *Vitale,* 370 U.S. 421 (1962); *Abington School District* v. *Schempp,* 374 U.S. 203 (1963).

As in the present case, the initial efforts to overrule those decisions were through constitutional amendment. See Hearings Before the Committee on the Judiciary, House of Representatives, 88th Congress, Second Session on Proposed Amendments to the Constitution Relating to Prayers and Bible Reading in the Public Schools, April 22-June 3, 1964, Serial No. 9. These proving ineffective, the next step, as in respect to the civil rights decisions, was through devices of evasion and avoidance. These included the so-called "cookie prayer", recited by kindergarten children before their morning snack, from which the word "God" was removed; pupil or parent initiated prayers; and classroom reading of the daily opening prayers of the Senate or House of Representatives as printed in the Congressional Record. In all these cases, as in others, the lower courts held that these patent efforts to evade the *Engel-Schempp* decisions could not stand, and in all the instances that the cases reached this Court the lower courts' decisions were upheld. *DeKalb School District* v. *DeSpain,* 255 F. Supp. 655, affirmed 384 F. 2d 836, certiorari denied 390 U.S. 906 (1968); *Stein* v. *Oshinsky,* 224 F. Supp. 757, affirmed 348 F. 2d 999, certiorari denied 382 U.S. 957 (1965); *State Commissioner of Education* v. *School Committee,* 358 Mass. 776, certiorari denied 401 U.S. 929 (1971); *Board of Education of Netcong, N.J.* v. *State Board of Education,* 108 N.J. Super. 564, 262 A. 2d 21, affirmed 57 N.J. 172, 270 A. 2d 312, certiorari denied 401 U.S. 1013 (1971).

The present case illustrates the same pattern. During the 1975-76 session of Congress more than 50 resolutions



were introduced in the House of Representatives aimed at voiding *Wade* and *Bolton.* (Among others were H.J. Res. 96, 99, 121, 132, 197, 246, 422, 681.) See also Constitutional Aspects of the Right to Limit Childbearing, Report of the United States Commission on Civil Rights, April 1975. None of these, of course, has succeeded, nor is likely to succeed. This is hardly surprising in view of the fact that polls consistently show that the majority of Americans support rather than oppose the *Wade* and *Bolton* decisions. Hence, as in respect to the rights of racial minorities and Bible and prayer in the public schools, comes the next step of evasion and avoidance.

In point of time, the first instance of this development in respect to abortion was in the case of *Commonwealth* v. *Edelin,* now before the Supreme Judicial Court of Massachusetts (Suffolk County; Sitting, 1975, No. 393). This deals with a prosecution for homicide instituted against a reputable physician using accepted medical procedure to provide a woman with an abortion which she voluntarily sought and which this Court held she had a constitutional right to obtain and the defendant had a constitutional right to provide.

*Planned Parenthood of Central Missouri* v. *Danforth,* —— U.S. ——, 96 S. Ct. 2831 (1976), represents another instance of attempted frustration and avoidance. There this Court held unconstitutionally violative of the *Wade-Bolton* principles a statute requiring spousal or parental consent to an abortion and forbidding the use of the most commonly used, effective and safe abortion procedure. See also *Bellotti* v. *Baird,* —— U.S. ——, 96 S. Ct. 2857 (1976).

Another instance, also arising in Missouri, is the action of the state legislature prohibiting Medicaid payments to women receiving welfare benefits who had undergone non-therapeutic abortions while, at the same time, allowing such payments to women welfare recipients who carried their pregnancies to term. See *Singleton* v. *Wulf*, —— U.S. ——, 96 S. Ct. 2868 (1976).

The present case represents still another instance, and one which it may safely be presumed will not be the last, of governmental effort to frustrate or limit the decisions in *Wade* and *Bolton*. If it succeeds it can only be partially effective, for it will not prevent abortions for women who can afford to pay for them or to travel to another state or city where they are easily available. (*Cf. Bigelow* v. *Virginia*, —— U.S. ——, 95 S. Ct. 2222 (1975), invalidating a statute forbidding advertisements of out-of-state abortion services.) As we seek to establish later in this brief, this partial effectiveness results in unconstitutional discrimination against the poor. Here, however, we urge only that, should it succeed, it would result in an effective nullification of a freedom secured by the Bill of Rights to the poor no less than the well-to-do and would make a mockery of the Supremacy Clause.



## II

**The mayor's action challenged herein violates the First Amendment's dual guaranty of church-state separation and the free exercise of religion.**

There are instances where the dual First Amendment guaranties of church-state separation and freedom of religious exercise are or appear to be in conflict with each other, calling upon or apparently calling upon the courts to make a choice between them. See, *e.g., Walz* v. *Tax Commission*, 397 U.S. 664 (1970) (tax exemption for churches); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972) (compulsory attendance at secondary schools); *Parker Seal Company* v. *Cummins*, 516 F. 2d 544, certiorari granted, —— U.S. ——, 96 S. Ct. 1409) ("Religious Accommodation" amendment to 1964 Civil Rights Act). Whether or not these cases present real conflict is by no means certain but, in any event, if they do, they constitute the exception rather than the rule. In the overwhelming majority of cases, the dual guaranties of the Amendment support rather than conflict with each other. See, *e.g., Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94 (1952); *Torcaso* v. *Watkins*, 367 U.S. 488 (1961).

The last cited case is particularly apposite. There the Court held violative of both guaranties in the Religion Clause of the First Amendment a state statute barring from public office any person who refused to take an oath that he believed in the existence of God. The Court reached this conclusion notwithstanding the fact that the plaintiff was an avowed atheist and therefore had no religion, at least as that term is generally understood. Just as freedom of

speech guarantees equally freedom of nonspeech (*West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624 (1943)), so the Court held, does freedom of religion guaranty freedom of nonreligion or, as often stated, freedom from religion.

(It need hardly be noted that requiring municipal hospitals to furnish abortion services does not impair the religious freedom of any physicians, nurses or other hospital employees whose religious conscience forbids them to participate in an abortion procedure. Both by federal statute (42 U.S.C. 300a) and by similar statutes in practically every state in the Union, no sanction can be imposed for refusal because of religious conscience to participate in an abortion procedure. See, Stern, Abortion Conscience Clauses, 11 *Col. Journ. of L. and Social Probl.* 571 (1975).)

The mayor's action in forbidding abortions in St. Louis municipal hospitals violates not only the Free Exercise Clause but also the Establishment Clause by imposing upon the entire community the religious doctrine of those to whom abortions are sinful. In *Meek* v. *Pittenger,* 421 U.S. 349 (1975), the Court set forth the following test as a distillation of its efforts over the past decades to evaluate a wide range of governmental action challenged as violative of the constitutional prohibition against laws respecting an establishment of religion:

> First, the statute must have a secular legislative purpose. E.g., *Epperson* v. *Arkansas,* 393 U.S. 97. Second, it must have a "primary effect" that neither advances nor inhibits religion. E.g. *School District of Abington Township* v. *Schempp,* 374 U.S. 203. Third,



> the statute and its administration must avoid excessive government entanglement with religion.

Although the Court spoke in terms of "statute", the same principles and the same three-pronged test are applicable to executive action. *Anderson* v. *Laird,* 466 F. 2d 283 (D.C. Cir. 1972), certiorari denied, 409 U.S. 1076 (1972); *Cruz* v. *Beto,* 405 U.S. 319 (1972).

*Epperson* v. *Arkansas,* 393 U.S. 97 (1968), cited by the Court as an instance of a law which failed to pass the secular legislative purpose test, is particularly relevant here. It shows how a law, though neutral on its face, must be declared unconstitutional under the Establishment Clause if an examination of its historical background establishes that its purpose was to advance religion. The statute made it unlawful for a teacher in any state-supported school or university "to teach the theory or doctrine that mankind ascended or descended from a lower order of animals."

The Court, on the basis of its examination into the events preceding and contemporary with the enactment of the statute, reached the conclusion that "there can be no doubt that Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man." 393 U.S. 97 at 107.

The historical background of anti-abortion laws is set forth in some detail in *Wade,* 410 U.S. at 130-141, and need not be repeated here. The religious origin and purpose of these laws has been widely recognized by scholars and

jurists alike.[1] Justice Douglas noted this in his dissenting opinion in *United States* v. *Vuitch*, 402 U.S. 62, 78-79 (1971):

> Abortion statutes [he said] deal with conduct which is heavily weighted with religious teachings and ethical concepts. Mr. Justice Jackson once spoke of the "treacherous grounds we tread when we undertake to translate ethical concepts into legal ones, case by case." . . . The difficulty and danger are compounded when religion adds another layer of prejudice. The end result is that juries condemn what they personally disapprove. (Citations omitted.)

Substituting the word "mayors" for "juries" in the last sentence makes the quotation particularly apposite here.

Justice Douglas quoted the following from an article by former Justice Clark (at 79, n. 2):

> Throughout history religious belief has wielded a vital influence on society's attitude regarding abortion. The religious issues involved are perhaps the most frequently debated aspects of abortion. At the center of the ecclesiastical debate is the concept of "ensoulment" or "personhood," i.e., the time at which the fetus becomes a human organism. The Reverend Joseph F. Donseel of Fordham University admitted that no one can determine with certainty the exact moment at which "ensoulment" occurs, but we must deal with the moral problems of aborting a fetus even if it has not taken place. Many Roman Catholics believe that the soul is a gift of God given at conception. This leads to the conclusion that aborting a pregnancy at any time amounts to the taking of a human life and is therefore against the will of God. Others, including some Catholics, believe that abortion should be legal until the baby is viable, i.e., able to support itself outside the womb. In balancing the evils, the latter concluded that the evil of destroying the fetus is outweighed by the social evils accompanying forced pregnancy and childbirth. Religion, Morality, and Abortion: A Constitutional Appraisal, 2 Loyola U.L. Rev. (L.A.) 1, 4 (1969).

1. See D. Callahan, Abortion: Law, Choice and Morality, Ch. 12 (1970); J. Noonan, Contraception (1965); Noonan, "Abortion and the Catholic Church: A Summary History," 12 National Law Forum 85-131 (1967); R. J. Huser, The Crime of Abortion in Canon Law (1942). See also Tietze and Lewitt, "Abortion," 220 Scientific American 21 (January, 1969) where opposition to abortion is traced to the rise of the Jewish and Christian religions.



It is true that the arguments presented by advocates of return to anti-abortion laws are often presented in terms of morality rather than religion or theology; it could hardly be otherwise in a nation with a strong commitment to the separation of church and state. But, as the Court said in *Bigelow* v. *Virginia*, "A State cannot foreclose the exercise of constitutional rights by mere labels." —— U.S. ——, 95 S. Ct. at 2235 (1975). The association of religion and morals is widely accepted, particularly among those with religious commitments. The "morality" plays of Elizabethan England were religious plays. Jefferson called God "the author of all the relations of morality."[2] Clergymen and educators today commonly speak of "moral and spiritual values." The Catholic Church affirms its infallibility in teaching doctrines of "moral and spiritual values," and the Baltimore Catechism defines a "doctrine of faith or morals" as "a truth revealed by God dealing with what we must believe or what we must do in order to be saved."[3] It is no mere coincidence that positions on the morality or immorality of abortion vary among religious groups in con-

2. 1 A.P. Stokes, *Church and State in the United States* 337 (1950).

3. 1949 Edition, p. 127.

formity to their religious commitments. No church whose doctrine or discipline forbids abortion holds it to be moral; and no church whose doctrine or discipline permits abortion deems it to be immoral.[4]

In the present case, the mayor has sought to impose upon the entire community the religious doctrine of those to whom abortions are sinful. This unconstitutional imposition cannot be justified on the claim that abortion is immoral any more than a law banning the use of contraceptives can be so justified. *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972). In either case the claim of immorality is no more than an effort to compel the entire community to conform to the religious doctrines of a particular group. That is particularly true where, as in both cases, the majority of Americans do not consider the practice to be immoral.

Little need be added to show that the effect, or at the very least a primary effect, of the mayor's action is to advance the religious doctrine of those who hold abortions to violate God's law. It imposes upon those who do not share his view the theology of those who do. If establishment of religion means anything, it means imposing on all the community the theology of some, and it is immaterial whether the theology is that of a majority of the community, or whether it is frankly designated as theology or labeled

4. A brief *amici curiae* in support of the appellants' position in *Wade* and *Bolton* was filed by the following organizations: American Ethical Union, American Friends Service Committee, American Humanist Association, American Jewish Congress, Episcopal Diocese of New York, New York State Council of Churches, Union of American Hebrew Congregation (Reform), Unitarian Universalist Association, United Church of Christ, and Board of Christian Social Concerns of the United Methodist Church.



morality. As Justice Clark said in the article from which we have already quoted:

> Despite the fact that religious belief continues to permeate our attitude toward abortion, most people today agree with Justice Holmes that "moral predilections must not be allowed to influence our minds in settling legal distinctions." (O.W. Holmes, the Common Law)[5]

Nor need much be said in respect to government entanglement in religious controversy and political division along religious lines, the avoidance of which was one of the major purposes of the Establishment Clause. No one exposed to newspapers, periodicals and other media of public communication can be unaware of the religious acrimony and religio-political divisiveness brought on by the abortion controversy. Framing the controversy in terms of morals aggravates rather than ameliorates the conflict, for it implies that those religious groups who oppose coercive anti-abortion governmental action support or at least condone immorality.

We conclude this section of our brief by noting that abortion is not the only medical procedure unacceptable to some religious groups. While abortion is not acceptable to Catholics, some Protestants and Orthodox Jews, blood transfusions are deemed sinful by Jehovah's Witnesses. Suppose at the next election in St. Louis the petitioner herein were replaced by a member of the Jehovah's Wit-

5. 2 Loyola L. Rev. (L.A.) at p. 6. It is significant that Justice Clark was the author of the opinion in *Abington School District* v. *Schempp*, *supra*, in which the purpose and effect test was formulated. It is obvious that the author of the establishment test does not consider anti-abortion laws and regulations consistent with it.

nesses sect. Can it be argued that, consistent with the First Amendment, he could forbid transfusions at municipal hospitals? Or suppose he were a Christian Scientist who believed consumption of fluoridated water to be sinful. Could he constitutionally ban its use in municipal hospitals? We can see no constitutional distinction between these hypothetical instances and the present case. All raise the same basic issue: Does the First Amendment sanction imposition by a public official of his own religious prohibitions upon the entire community? The question, we suggest, answers itself, for if the answer is yes we may be on our way back to the Peace of Augsburg and its Erastian principle, *cujus regio, ejus religio,* whereunder the religion of a province is determined by the religion of its prince. M. E. Marty, A Short History of Christianity (1959) 243.

## III

**The mayor's action constitutes discrimination against the poor in violation of the Equal Protection Clause of the Fourteenth Amendment by denying to them a procedure readily and lawfully available to the economically advantaged.**

We do not, of course, claim that a municipal hospital is constitutionally obligated to provide all procedures available at private hospitals. Obviously it may not be required to provide cosmetic operations. We urge only that exclusion of a procedure that is readily and lawfully available to the economically advantaged at private hospitals, for no reason other than the mayor's individual religious and moral commitments, deprives the poor of the equal protection of the laws in violation of the Fourteenth Amendment.



Nor do we urge that access to free municipal hospital services is a right rather than a privilege. *Cf. San Antonio School District* v. *Rodriguez,* 411 U.S. 1 (1973). However they may be designated, they may not be withheld on the basis of constitutionally impermissible classifications such as speech, association, religion or race. "The appellees," this Court said in *Speiser* v. *Randall,* 357 U.S. 513 (1958), "are plainly mistaken in their argument that, because a tax exemption is a 'privilege' or 'bounty', its denial may infringe speech," and this principle is no less applicable to religious barriers to other governmental benefits or opportunities. *Torcaso* v. *Watkins,* 367 U.S. 488, 495-496 (1961). The Court was quite clear on this point in *Sherbert* v. *Verner,* 374 U.S. 398 (1963), where it said (at p. 404):

> Nor may the South Carolina court's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's "right" but merely a "privilege." It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.

What we urge is that the mayor's action barring from municipal hospitals women seeking abortion procedures which he deems religiously or morally unacceptable but which are available in private hospitals to the economically advantaged violates the Fourteenth Amendment no less than barring from attendance at free public schools students who manifested their opposition to our participation in the Vietnam war by wearing black armbands. See *Tinker* v. *Des Moines School Board,* 393 U.S. 503 (1969).

While decided under the Due Process rather than the Equal Protection Clause of the Fourteenth Amendment,

we believe apposite the seminal decision in *Gideon* v. *Wainwright,* 372 U.S. 335 (1963), holding that the states must provide free legal services to poor persons accused of crime. Even more relevant, since decided under the Equal Protection as well as the Due Process Clause of the Fourteenth Amendment, are decisions such as *Griffin* v. *Illinois,* 351 U.S. 12 (1956), and *Douglas* v. *California,* 372 U.S. 353 (1963), holding that indigent defendants appealing convictions were constitutionally entitled respectively to free trial transcripts and services of counsel. See also, *Eskridge* v. *Washington State Board,* 357 U.S. 12 (1956); *Draper* v. *Washington,* 372 U.S. 487 (1963); *Lane* v. *Brown,* 372 U.S. 477 (1963). Cogent and relevant here is the Court's statement in *Douglas* v. *California, supra* (372 U.S. at 357-358):

> There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself.

Perhaps even more relevant (since it might be argued that, whereas the state compels persons to defend themselves in criminal cases, it does not compel them to bear or not to bear children) is *Boddie* v. *Connecticut,* 403 U.S. 371 (1971). There the Court held unconstitutionally discriminatory against the poor the denial of access to divorce proceedings by persons unable to pay the requisite court fees. The case would perhaps be closer to the present one but hardly less cogent if the prohibition of free access to the



divorce court were based on the lawmaker's belief that divorce was both contrary to God's will and immoral. Or, to suggest an instance even closer to the present one, suppose the petitioner herein, in his capacity as mayor of St. Louis, ordered the city's magistrates and clerks not to solemnize marriages of divorced persons because he deemed them contrary to religion and morality. The point is that, since the mayor's religious beliefs are constitutionally irrelevant and, since this Court ruled in *Wade* and *Bolton* that abortions are not immoral, the mayor's denial of abortion services to economically disadvantaged women at municipal hospitals because he deems such services to be immoral denies to them the equal protection of the laws to the same extent as a similarly motivated denial to economically disadvantaged divorced persons of the right to the services of a magistrate or clerk for the solemnization of further marriages.

Most cogent and relevant to the present case is the Court's decision in *Shapiro* v. *Thompson,* 394 U.S. 618 (1969), wherein the Court struck down as invidious discrimination, violative of the Equal Protection Clause, a statutory prohibition of welfare benefits to persons resident in the state for less than a year. After holding that it was irrelevant whether welfare benefits be deemed a right or a privilge (footnote 6), the Court addressed itself to the question whether there was a justification for the discrimination against the new residents sufficient to meet the challenge under the Fourteenth Amendment.

A state, the Court held, has a valid interest in preserving the fiscal integrity of its programs, and may legitimately

attempt to limit its expenditures whether for public assistance, public education, or any other program.

> But [the Court continued] a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools. Similarly . . . appellants must do more than show that denying welfare benefits to new residents saves money. *The saving of welfare costs cannot justify an otherwise invidious classification.* 394 U.S. at 633 (Emphasis added.)

By reason of the First Amendment, the religious impermissibility of abortions may not give rise to legal consequences. Under *Wade* and *Bolton,* an abortion is as morally neutral as traveling from state to state to obtain more advantageous welfare benefits. In neither case can a state under the Equal Protection Clause deny the service because it disapproves of the applicant's motivation. Moreover, under *Shapiro* v. *Thompson,* the saving of welfare costs (even if it be assumed that it would be more expensive for the city to finance abortions than to care for unwanted abandoned infants) cannot justify an otherwise invidious classification. Even under traditional equal protection criteria, the Court held further, a classification of welfare applicants according to whether they had lived in the state for one year would seem irrational and unconstitutional. So too, we suggest, would a classification according to whether they seek abortion or other hospital services. In any event, the Court continued in *Shapiro* v. *Thompson,* since the classification touched on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest. The right to an abortion, we believe, is no



less fundamental. With equal clarity, both violate the Equal Protection Clause.

Perhaps even more relevant and cogent is *Memorial Hospital* v. *Maricopa County,* 415 U.S. 250 (1974). There the Court struck down as violative of the Equal Protection Clause a state statute requiring a year's residence in a county as a condition to an indigent's receiving nonemergency hospital or medical care at the county's expense. On the authority of *Shapiro* v. *Thompson,* the Court held that the state's burden of establishing a compelling state interest was not met by the claim that the requirement was necessary to inhibit migration of indigents, deter them from taking up residence solely to utilize medical facilities, protect residents whose taxes financed maintenance and operation of the hospital, prevent fraud and assure budget predictability.

If a mayor may not consistent with the Fourteenth Amendment deny access to free hospital and medical services by reason of the applicant's recent arrival into the community, we are unable to see how he may to do so by reason of his dislike of the type of the lawful hospital and medical services the applicant seeks.

## Conclusion

**For the foregoing reasons the judgment of the court below should be affirmed.**

Respectfully submitted,

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